

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SANDRA L. GLIMPSE

Claimant

VS.

AMERICAN INSULATED WIRE

Respondent

AND

TRAVELERS INSURANCE COMPANY and

OLD REPUBLIC INSURANCE COMPANY

Insurance Carriers

Docket No. 1,012,040

ORDER

Respondent appeals the October 7, 2005 Award of Special Administrative Law Judge Vincent L. Bogart. Claimant was awarded a 9 percent permanent partial general disability for injuries suffered to her bilateral shoulders, chest and back while employed with respondent. The Appeals Board (Board) heard oral argument on January 20, 2006.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier, Travelers Insurance Company, appeared by their attorney, William L. Townsley, III, of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Special Administrative Law Judge (SALJ). Respondent, in its brief to the Board (citing page 4 of the regular hearing transcript), states that "Although the caption lists both Travelers and Old Republic as insurance carriers, it is stipulated that Travelers is the only carrier involved."¹

¹ Resp. Brief at 1.

ISSUES

What is the nature and extent of claimant's injury? More particularly, did claimant suffer injury to her right and left shoulders, chest and back or are claimant's injuries, associated with her employment with respondent, restricted to her right upper extremity at the shoulder level?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be affirmed.

Claimant was an employee of respondent for almost five years. In March of 2003, she began experiencing problems with her shoulders, back, chest and arms. These problems were reported to her lead, Terry Davison, and Mr. Davison told claimant's supervisor, Barbara Darnell. At some point, claimant asked Ms. Darnell about seeing a doctor. Ms. Darnell advised claimant she (Ms. Darnell) would have to talk to the safety manager, Alvie Warrenburg. However, no one ever contacted claimant about going to a doctor. Claimant was forced to seek medical treatment on her own.

Claimant, as a self referral, initially saw Dawn McCaffrey, the physician's assistant for Dr. Paul Sandhu, in Coffeyville, Kansas, on March 23, 2003, and was referred for physical therapy. Claimant advised the safety manager that she was going to physical therapy, and there was no objection from the safety manager. She then, again as a self referral, went to Dr. J. E. Block in Coffeyville, Kansas. Dr. Block, who was identified to claimant as the company doctor, advised her that he believed claimant's problem was work related and referred claimant to respondent's workers compensation department. Claimant filled out accident reports weekly, with respondent denying the claim.

Claimant made an appointment with Dr. Howell, an orthopedic surgeon in Coffeyville, Kansas, without referral from respondent. Dr. Howell did x-rays and scheduled nerve conduction studies. However, these tests were not completed, as claimant hired an attorney and was then sent by respondent to Dr. Kevin Komes, a physiatrist in Pittsburg, Kansas. Claimant saw Dr. Komes on several occasions in Joplin, Missouri. Dr. Komes referred her for more physical therapy, prescribed anti-inflammatory medications and placed her on work restrictions.

Claimant's original job with respondent was as a machine operator, which required that she put wire onto spools and reels, with the wire weighing from 5 to 20 pounds and the reels weighing over 50 pounds. After claimant was placed on restrictions by Dr. Komes, in approximately August of 2003, claimant was placed on lighter duty.

When claimant first sought treatment, her complaints consisted primarily of right upper extremity complaints, including her right shoulder. Claimant, however, testified that the pain, at times, extended into her back and through her chest.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on September 3, 2003. Claimant described pain between the shoulder blades, with radiation to her sternum. Dr. Prostic performed a physical examination, diagnosing instability of claimant's right shoulder. He found claimant's ongoing difficulties to be caused by her work activities with respondent.

Claimant returned to Dr. Prostic for a second examination on August 25, 2004, again at claimant's attorney's request. Claimant continued to have right shoulder pain, with pain progressing across her back, towards the left scapula, as well as across her right anterior chest. Dr. Prostic determined that claimant continued with instability of her right shoulder and probable laxity of the left shoulder as well. He found claimant's ongoing problems to be associated with her work at respondent. He felt that claimant should continue with rigorous strengthening exercises and restricted activities. He cautioned that if claimant's symptoms worsened, she may be considered for reconstructive surgery of the right shoulder. Dr. Prostic assessed claimant a 12 percent impairment of the right upper extremity at the shoulder and a 3 percent impairment of the left upper extremity at the shoulder, which when combined calculate to a 9 percent permanent partial impairment to the body as a whole on a functional basis pursuant to the fourth edition of the *AMA Guides*.²

Dr. Prostic acknowledged that when he examined claimant on September 3, 2003, claimant was not at maximum medical improvement and additional treatment was recommended. Dr. Prostic testified that at the time of the August 25, 2004 examination, claimant was at a stable point in her rehabilitation. However, he agreed that it was possible claimant could be made better. When Dr. Prostic performed range of motion testing, he found both shoulders to be normal, but found weakness of external rotation bilaterally.

Dr. Prostic acknowledged that in utilizing the *AMA Guides* to arrive at his impairment, he had to bend the tables in order to get an answer from the fourth edition, testifying that claimant's diagnosis was not specifically addressed by the *AMA Guides*.

Claimant was referred for an evaluation to board certified physical medicine and rehabilitation specialist Philip R. Mills, M.D., for a court-ordered independent medical examination. Dr. Mills diagnosed fibromyalgia in the right shoulder, testifying that claimant had reached maximum medical improvement at the time of the January 8, 2004 examination. Dr. Mills assessed claimant a 3 percent impairment to the body as a whole

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

for the problems to her right shoulder pursuant to the fourth edition of the *AMA Guides*.³ This would calculate to a 5 percent impairment at the shoulder level. He felt claimant should be restricted from prolonged reaching or overhead work on the right side, but provided no opinion regarding the limitations for claimant's left shoulder and gave her no impairment to the left shoulder.

Dr. Mills acknowledged that at the time of his January 2004 examination, claimant had not begun developing problems with her left upper extremity, but agreed that claimant's job involved a lot of pushing and pulling. He acknowledged on cross-examination that fibromyalgia is a condition that may intensify if claimant continues to perform strenuous activity. When asked if claimant's repetitious work at respondent, which caused her to develop fibromyalgia on the right, would make her predisposed to also develop fibromyalgia on the left, Dr. Mills responded that he could not rule that out.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁵

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.⁶

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁷

In this instance, respondent argues there is a conflict between the impairment opinions of Dr. Prostic and Dr. Mills. Dr. Mills limited claimant's functional impairment to her right upper extremity, while Dr. Prostic assessed claimant an impairment to both the

³ *AMA Guides* (4th ed.).

⁴ K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁶ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

right and left upper extremities at the level of the shoulder. As noted in claimant's brief, Dr. Mills examined claimant on January 8, 2004. Dr. Prostic had the opportunity to examine claimant on two occasions: on September 3, 2003, and again on August 25, 2004. Claimant's problems with her left shoulder developed after the complaints to the right, with both slowly progressing over a period of time. Dr. Mills acknowledged that the fibromyalgia, diagnosed in claimant's right upper extremity, is a condition that if an employee continues to perform the activities which caused the initial condition, could grow in intensity.

The Board finds the opinion of Dr. Prostic to be the more persuasive, as Dr. Prostic had the opportunity to examine claimant on more than one occasion and to assess claimant's condition after claimant had developed additional problems stemming from her ongoing employment activities with respondent. The medical evidence from Dr. Prostic also convinces the Board that while claimant's conditions developed over a long period of time, from this record it appears clear that claimant suffered simultaneous aggravation to her upper extremities, thereby resulting in a permanent impairment to the body as a whole under K.S.A. 44-510e, rather than separate scheduled injuries as contained in K.S.A. 44-510d.⁸ The Board, therefore, finds that the Award of the SALJ granting claimant a 9 percent permanent partial general disability should be, and is hereby, affirmed.

In the Award, the SALJ found, in the conclusions of law paragraph, that claimant sustained an injury arising out of and in the course of her employment on or about the date alleged and continuing thereafter.⁹ In the final award paragraph, the SALJ held that claimant suffered an accidental injury on March 1, 2003. From the inception of this claim, claimant has alleged accident beginning March 1, 2003, and continuing each and every day thereafter. The E-1 Application For Hearing (filed August 4, 2003, with the Division of Workers Compensation) and claimant's attorney's announcement at the regular hearing do not vary from those accident date allegations. Unfortunately, in this record, there is no indication as to the concluding date of accident. Even though claimant's job duties varied, she testified at regular hearing that all her job duties with respondent continually aggravated her condition on a daily basis.¹⁰ As noted above, claimant's complaints involved her right and left shoulders, her back, across her chest and towards the left scapula.

The Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury is the last day

⁸ *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

⁹ Award at 3 (Oct. 7, 2005).

¹⁰ R.H. Trans. at 30-31.

worked.¹¹ However, in this instance, where claimant continues working, the Board finds claimant's date of accident to be February 21, 2005, the last day claimant performed her job duties for respondent before the regular hearing.¹² In this regard, the Award of the SALJ is modified.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Vincent L. Bogart dated October 7, 2005, should be, and is hereby, modified with regard to the date of accident, but affirmed in all other regards.

IT IS SO ORDERED.

Dated this ____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
(Travelers Insurance Company)
Vincent L. Bogart, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

¹² R.H. Trans. at 36-37.